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JUN 3 1943
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 1063 80

LA SOCIETE FRANCAISE DE BIENFAISANCE MUTUELLE (A CORPORATION),

Petitioner,

vs.

CALIFORNIA EMPLOYMENT COMMISSION, FORMERLY KNOWN AS UNEMPLOYMENT RESERVES COMMISSION.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT, DIVISION ONE AND BRIEF IN SUPPORT.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 1063

LA SOCIETE FRANCAISE DE BIENFAISANCE MUTUELLE (A CORPORATION),

Petitioner,

vs.

CALIFORNIA EMPLOYMENT COMMISSION, FORMERLY KNOWN AS UNEMPLOYMENT RESERVES COMMISSION.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, La Societe Francaise de Bienfaisance Mutuelle, of San Francisco, California, respectfully prays that a writ of certiorari issue to review the judgment of the District Court of Appeal of the State of California for the First Appellate District, Division One, entered January 8, 1943, in an action numbered and entitled on its docket, 1 Civil No. 12,160 *La Societe Francaise de Bienfaisance Mutuelle,* Plaintiff and Appellant, vs. *California Employment Commission,* Defendant and Respondent, affirming the

judgment of the Superior Court in and for the City and County of San Francisco denying a recovery of all *employer's* contributions paid under the Unemployment Insurance Act.[1]

Summary Statement of the Matter Involved.

Petitioner sued to recover $36,045.84 paid, under protest, as unemployment contributions for the period from January 1, 1936, to March 31, 1940, and as interest on arrears. It contends that, as a nonprofit corporation, the number of whose members is without limit and whose only activity is the operation of its hospital and the treatment of the sick, it is a "charitable" corporation within the meaning of the Social Security Act[2] and of the corresponding provision of the State Act,[3] each of which provides that "the term 'employment' does not include":

> "Service performed in the employ of a corporation, community chest, fund or foundation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any shareholder or individuals."

The facts are undisputed and fully appear from the findings (R. 16-40).

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[1] In 1937, respondent and the Commissioner of Internal Revenue each had ruled that petitioner was a charitable corporation and wholly exempt. In 1939 these rulings were reversed. The trial court's judgment was reversed as to (a) *employees'* contributions accruing *before* the 1939 rulings, prior whereto petitioner had refunded to its employees amounts theretofore deducted from their wages and had discontinued further deductions, and (b) as to interest paid in respect of contributions (employer's and employees') claimed by respondent to have accrued before such 1939 rulings, (R. 67).

[2] 49 Sts. c. 531, p. 620, Sections 811 (b) (8) and 907 (c) (7), now Sections 1426 (b) (8) and 1607 (c) (7) of the Internal Revenue Code.

[3] Stats. 1935, p. 1226; Gen. Laws 1937, p. 4121, Act No. 8780d.

Petitioner was founded in San Francisco in 1851 (R. 16). In 1856, it was incorporated by the filing of a certificate stating only, as the statute required,[4] that the members had elected certain trustees and had determined that they and their successors should forever be known by petitioner's present name (R. 44). Said certificate places no restriction or limitation upon the persons who may receive the benefits of its hospital or services nor confines such benefits to members (R. 26-27).

The By-Laws (R. 26) provide:

> "The Society is founded on the basis of mutuality for the treatment of sick members; neither political nor religious questions can ever be considered in its midst."

During its existence, petitioner has received donations and bequests aggregating $351,853.74 (R. 18), which, with the income therefrom, has amounted to over $500,000, or more than half its assets (R. 27-28). Without them, it could not have acquired its present plant nor give the service which it renders (R.18). In times of need, it has received other forms of public assistance (R. 29-30).

Petitioner owns and operates in San Francisco a large modern hospital[5] equipped to treat every kind of illness (R. 19), with a capacity of two hundred twenty-five beds and a nursery for children. The hospital site and buildings represent its principal asset, in addition to which it has reserves reasonable in character and amount (R. 27-28).

Petitioner's services are not restricted to members, but are available to and actually used by the public, without

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[4] Chapter VIII of the Corporation Act of 1850, "Relating to Religious and other Associations or Societies", (Stats. 1850, at p. 373).

[5] It is approved by American Medical Association and by American College of Surgeons as a Class "A" Hospital, (R. 19).

distinction as to race, creed or color (R. 19).[6] It provides for the training of interns (R. 22), and maintains, at large expense, a nurse's training school (R. 21).

Petitioner has about 9,900 members (R. 24). Their number is unlimited (*id.*), and it has always admitted new members (R. 17). Admission to membership is limited to persons (wholly or partly) of French birth or origin, or speaking French (this is applied with liberality), or the spouse of a qualified member (R. 27).

Petitioner has no capital stock, and no interest, dividends or other pecuniary distributions in any form or manner, or sick or death benefits, have ever been paid to anyone (R. 17). Its directors, who manage its affairs, serve without compensation (R. 24). Any net earnings have always been devoted to the improvement of its plant and the betterment of its services (R. 17-18).

Monthly dues are $1.75, but children, one of whose parents is a member, pay one dollar (R. 24). Life members, who have prepaid in full, otherwise have the same rights and privileges.

Continued payment of dues is not, however, a condition to relief. In the case of indigent member-widows and of other needy members, such dues are paid from petitioner's relief fund set up, in 1905, for that purpose (R. 23). A member under seventeen years, if orphaned or abandoned by his parents, pays no dues (R. 23). Student nurses, when members, pay no dues.

The benefits afforded to members are remarkable in their extent and variety (R. 24-25), as, for example, six months'

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[6] In petitioner's last fiscal year, thirty-two per cent of all patient-days at the hospital were recorded for non-members, (R. 29). This does not include outpatient service to members, (consultations by members or calls by the medical staff) amounting in that year to 39,208, (R. 26).

hospitalization and board, without charge, including medical and surgical care and treatment, but *without limit of time* in the case of indigent sick members or in the tuberculosis cases (R. 24). To its members and to the public, it gives other very substantial services, either gratuitously or at cost (R. 23).

During its five fiscal years ended February 29, 1940, petitioner's gross annual revenues from all sources has varied from $384,609.61 to $418,354.60. On an average, about 43 per cent was from members' admission fees and dues, about 54 per cent from receipts from member[7] and non-member patients, about two per cent from miscellaneous sources, such as income on investments, and somewhat less than one per cent from gifts and legacies (R. 28-29). The average daily cost to it per member-patient hospitalized was $5.07, and the average daily amount received, from dues and admission fees, from such hospitalized member-patients was $2.19 (R. 29).

The complaint (R. 11) alleged:

> "That, under the laws of the United States of America, plaintiff is exempt from the payment of said social security tax and unemployment tax, and that the attempted imposition upon or exaction from it of any such tax, allegedly in pursuance of said Unemployment Reserves Act (now known as Unemployment Insurance Act) is contrary to the laws of United States of America in that behalf, and to Section 2 of Article IV of the Constitution of the United States and to the Fourteenth Amendment to said Constitution."

This Federal ground, if well taken, is decisive of the matter. Non-Federal grounds, even if otherwise valid, become immaterial.

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[7] E. G. payment for private rooms—at about one-half of the regular rates—and facilities in addition to those to which membership entitles them, (R. 25).

The trial court (R. 39) found that

> "Neither under the laws of the United States of America nor under the laws of the State of California was or is the plaintiff exempt from the payment *to the defendant* of the taxes or contributions imposed upon it (the plaintiff) or its workers under the California Unemployment Insurance Act." (Italics ours.)

but declared (R. 39) that

> "No finding is made as to whether plaintiff is or is not exempt from the payment of unemployment taxes *to the United States of America.*" (Italics ours.)

The opinion of the District Court of Appeal states:

> 1. "We are unable to agree with appellant as to the view, purpose and intent of Congress, that hospitals not operated for profit are charitable institutions." (R. 56.)
>
> 2. That petitioner "is not 'exclusively' a charitable organization" for the reason that net earnings from hospital services to non-members enable it to render better service to its own members, (R. 54).
>
> 3. That "the statute provides that the institution or corporation must be conducted 'exclusively' for charity" (R. 56), and that "the corporation fund or foundation must be operated 'exclusively' for charity" (R. 58).

(The opinion states (R. 49) that petitioner had contended that "the court must look to 'the general understanding throughout the country' for the construction of the terms employed" in the State and Federal acts. *This is incorrect.* What we stated (Appell. Open. Br. p. 61) was, that "even if the intention of Congress *did not clearly appear* from the legislative history of the Act, the meaning of 'charitable' would *then* be determined in the light of the 'general understanding' throughout the United States" as to such meaning).

Opinion Below.

The opinion of the District Court of Appeal is reported in 56 Adv. Cal. App. 593, and 133 Pac. (2d) 47, and appears in the record (R. 48-67). On March 8, 1943, the Supreme Court denied, without opinion, petitioner's application that the cause be heard and determined by it (R. 68).

Statement of Basis of Jurisdiction.

1. The judgment of the District Court of Appeal sought to be reviewed was entered January 8, 1943 (R. 67). It became final therein February 7, 1943 (Cal. Const., Art. VI, Sec. 4c). The power of the State Supreme Court to order said cause to be heard and determined by it expired March 9, 1943 (*id.*) The three-months period for filing this petition begins to run from March 9, 1943.

2. The jurisdiction of this Court is invoked under Act of February 15, 1925, 43 Stat. 936, Judicial Code, Sec. 237(b), U. S. C. Title 28, Section 344(b).

Questions Presented.

Whether the District Court of Appeal erred

1. In holding that it was not "the view, purpose and intent of Congress that hospitals not operated for profit are charitable institutions" within the meaning of the Social Security Act.

2. In holding that the words,"no part of the net earnings of which inures to the benefit of any shareholder or individuals", refer to the purposes for which petitioner was organized and operated (viz: the treatment of the sick without profit), instead of to the destination of its income.

3. In holding that "exclusively", modifies "charitable", and not "organized and operated", and that "charitable" means "wholly free".

Reasons Relied Upon for Allowance of the Writ.

1. As far as this Court has construed the language involved, the opinion of the District Court of Appeal is directly opposed to *Trinidad* v. *Sagrada Orden,* 263 U. S. 578, 44 S. Ct. 204, 68 L. Ed. 458.

2. The questions presented are of far-reaching importance because:

(a) The opinion of the District Court of Appeal denies effect to the unmistakable intention and purpose of Congress. The House and Senate reports on the Social Security Act show, and that of the Conference Committee states, *in terms,* that "hospitals not operated for profit" were *not* to be taxed.

What gravely matters is not merely the application of the statute to the factual situation in this or some other case, but the nullifying and destructive construction which the opinion places upon it. For example, such non-profit hospitals include railroad hospitals, which have a supporting membership of many hundreds of thousands. It would be preposterous to contend that Congress intended to exclude *all* "hospitals not operated for profit", but at the same time to tax *railroad* hospitals.

(b) Non-profit hospitals constitute the largest class of hospitals in the United States. They number about three thousand, and comprise church, fraternal or other association-controlled institutions.[8] Many—probably most—received non-members at full rates.[9]

Unvoidably, then, the opinion, if sustained, brings within

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[8] "Vital Statistics—Special Reports, Hospital and other Institutional Facilities and Services, 1939", Vol. 13, No. 2, p. 7, (Issued by Bureau of the Census). Out of 6991 hospitals, 2967 are there classed as "*non-profit*", 1,729 as "*government*", and 2,295 as "*proprietary*". See, also, appendix, (p. 24).

[9] As, for example, in *Bedford* v. *Colorado Fuel & Iron Corp.* 102 Colo. 538, 81 Pac. (2d) 752, 759.

the Act virtually all non-profit hospitals. Until reversed, however, it will breed extensive litigation [10] and cause great uncertainty and confusion. Thus, pending an authoritative decision, all non-profit hospitals must meet serious problems, such as, for example, whether to withhold employee contributions, and whether to set aside reserves for contributions, thereby substantially diminishing working capital.

3. The disposition of the matter in the courts below peculiarly presents a situation calling for the exercise of this Court's supervisory jurisdiction, because:

(a) The complaint tendered the issue that petitioner "under the laws of the United States is exempt from the payment of said Social Security tax and unemployment tax." The trial court *refused* to make any finding thereon.

(b) The District Court of Appeal, though assuming to search for the proper construction of the Social Security Act, in fact ignored the decisive effect of its legislative history, which petitioner had strongly urged.[11] The California courts regularly recognize this as an aid to construction.[12]

4. Petitioner is about to apply for refund of Social Security taxes paid Federal Collector of Internal Revenue, and if such refund is denied, to bring suit for their recovery. A determination by this court will avoid multiplicity of action. On the other hand, the denial of this petition would probably be considered by the lower Federal courts as virtually an approval of the District Court of Appeal's opinion.

[11] The excerpts from the various committee reports appearing in the accompanying brief also appeared in the briefs in the courts below, (Appell. Open. Br. pp. 49, 52-54; Petition for hearing in Supreme Court, pp. 26-27, 37-38). These portions of the briefs are not part of the record, but respondent's counsel, we are confident, will not deny this. (This also applies to note (No. 13).

[12] *Southern Pacific Co.* v. *Ind. Acc. Com.*, 19 Cal. (2d) 271, 277, (1942); *County of Los Angeles* v. *Graves*, 210 Cal. 21, 27; *Sales* v. *Stewart*, 134 Cal. App. 661, 664, (hearing in Supreme Court denied); *Consolidated Rock Products Co.* v. *State*, 57 Adv. Cal. App. 1000, 1008, (Apr. 1943).

struction which this Court constantly invokes, and here would do so as a matter of course?

Likewise, the opinion of the District Court of Appeal ignores fourteen decisions (of this Court, various Circuit Courts of Appeal, the Board of Tax Appeals and the Treasury Department) construing the clause, "no part of the net income" &c. These, and two more, were also cited in the petition to the State Supreme Court.[13]

WHEREFORE, petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the District Court of the State of California for the first Appellate District, commanding that court to certify and send to this Court, for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and of all proceedings in the case numbered and entitled on its docket, 1 Civil 12, 160, *La Societe Francaise de Bienfaisance Mutuelle,* plaintiff and appellant, vs. *California Employment Commission,* defendant and respondent, and that the judgment of said District Court of Appeal be reversed and that your petitioner have such other and further relief in the premises as to this Court may seem proper.

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[13] Appell. Open. Br., pp. 178-189, Petition for hearing by Supreme Court, pp. 39-50. These cases are the *Sagrada Orden* case and those cited in Appendix D, (pp. 28-30).

PETITIONER'S

BRIEF

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 1063

LA SOCIETE FRANCAISE DE BIENFAISANCE MUTUELLE (A CORPORATION),

Petitioner,

vs.

CALIFORNIA EMPLOYMENT COMMISSION, FORMERLY KNOWN AS UNEMPLOYMENT RESERVES COMMISSION.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

A reference to the official report of the opinion of the District Court of Appeal is set forth in the petition (p. 7). For brevity, that reference is adopted here.

II.

Statement of Jurisdiction.

A concise statement of the grounds on which the jurisdiction of this Court is invoked is given in the petition (p. 7), and, by this reference thereto, is hereby adopted.

III.

Concise Statement of the Case.

A summary statement of the matter involved is given in the petition (pp. 2-6). To avoid duplication, that statement is incorporated herein as a concise statement of the case.

IV.

Specification of Errors.

The errors intended to be urged are those specified in the petition as the questions presented and numbered 1-3 (p. 7), all of which are specifically assigned as error.

V.

Summary of Argument.

1. Jurisdiction exists under Section 237 (b) of the Judicial Code, since a right, title, privilege or immunity is specially claimed under a statute of the United States, the construction of which is directly presented.

2. Congress intended that hospitals not operated for profit should not be taxed.

3. It is established that the clause, "no part of the net earnings of which inures to the benefit of any private shareholder or individuals", refers to the destination of the income, and not to its source. Furthermore, as regards non-profit hospitals, Congress has construed this language as not applying to such hospitals.

4. "Exclusively" modifies "organized and existing", and not "charitable". The latter does not mean "wholly free".

ARGUMENT.

I.

Jurisdiction exists under Section 237 (b) of the Judicial Code, since a right, title, privilege or immunity is specially claimed under a statute of the United States, the construction of which is directly presented.

"What constitutes a cause arising 'under' the laws of the United States has been often pointed out by this Court. One does so arise where an appropriate statement by the plaintiff, unaided by any anticipation or avoidance of defenses, discloses that it really and substantially involves a dispute or controversy respecting the validity, construction or effect of an act of Congress. If the plaintiff thus asserts a right which will be sustained by one construction of the law, or defeated by another, the case is one arising under that law." (Citing cases.)

First National Bank v. *Williams*, 252 U. S. 504, 512, 40 S. Ct. 372, 64 L. Ed. 690.

Accord:

Peyton v. *Railway Express Agency*, 316 U. S. 350, 353, 62 S. Ct. 1171, 86 L. Ed. 1525.

For its enforcement or denial, the right or privilege pleaded by petitioner depends directly upon the construction of the relevant sections of the Social Security Act. Although the trial court evaded its determination, the District Court of Appeal was constrained to, and did, place a construction on the *Federal* statute.

Under the Federal-State plan of unemployment relief, the Social Security Act is the underlying statute, upon which ultimately rests the right or privilege asserted by petitioner. Contributions, while collected by the State, are

destined immediately for the Federal Treasury (Int. Rev. Code, Sec. 1603 (3)), which, correspondingly, refunds those illegally collected.

As said in *Buckstaff Bath House Co.* v. *McKinley*, 308 U. S. 358, 60 S. Ct. 279, 282, 84 L. Ed. 242, the Social Security Act was "designed to operate in a dual fashion—state laws were to be integrated with the Federal Act; payments under state laws could be credited against liabilities under the other", and was intended "to bring the states into the cooperative venture". The states were "to become components of a unitary plan for unemployment relief." The act visualized a "coordinated scheme", and "when Congress brought within its scope various classes of employers it in practical effect invited the states to tax the same classes." Congress sought "to have the state law as closely coterminous as possible with its own", failing which "the hopes for a coordinated and integrated dual system would not materialize".

The Federal Act thus becomes in a sense the master statute, to which the state laws were invited, and were expected, to conform. Federal and State liability, and exemptions, were to run *pari passu*. Fundamentally, liability is referable to the *Federal* law.

California intended closely to conform. Section 2 of its Act provides that it "is enacted as a part of a national plan of unemployment reserves", should "take effect only if and when there is enacted legislation by the United States Government providing for a tax upon the payment of wages by employers in this state, against which all or any part of the contributions required by this act may be credited", and should "cease to be operative" whenever the Federal Act was so amended that "no portion of the contributions required by this Act may be thus credited."[14]

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[14] Section 2 appears in the appendix, (p. 125).

Furthermore, between September 15, 1935, and August 27, 1937 (when the entire section was recast), Section 9a of the State Act defined an "employer" as every individual, corporation, etc., "subject to a pay roll tax levied by the United States government, if the tax levied by this Act, or any portion thereof, may be credited against such pay roll tax."

The legislature "caused the state law to conform to the requirements of the federal law if the same should be enacted", *Gillum* v. *Johnson*, 7 Cal. (2d) 744, 754-755. It was enacted "not through independent action by the state, but in conjunction and cooperation with the federal government. Our statute is in the form suggested by federal agencies and has their approval", *Christgau* v. *Woodland Cemetery Ass'n.*, 208 Minn. 263, 293 N.W. 619, 623. The two "are interlocking statutes closely inter-related and dependent on each other," (*Rivaud* v. *Bijou Furniture Co.* (R. I. 1941), 21 Atl. (2d) 563, 567).

Similarly, the opinion of the District Court of Appeal (R. 66) states:

> "The state act follows the language of the federal statute and both together provide an integrated scheme of social security."

We submit, therefore, that jurisdiction exists under Section 237 (b) of the Judicial Code.

II.

The District Court of Appeal erred in holding that it was not the "view, purpose and intent of Congress that hospitals not operated for profit are charitable institutions".

Congress did not intend that the Social Security Act should apply to all employees. One-fourth of them, viz:

9,389,000 out of 37,743,000, were intentionally excluded. Among those excluded were "institutional workers".[15] The report of the House Committee on Ways and Means, and that of the Senate Committee on Finance (H. Rep. No. 615, p. 15, S. Rep. No. 628, p. 27), states:

"Total number of gainful workers	48,830,000
Total number of owners, operators, self-employed (including the professions)	12,087,000
Total of workers *excluded* because of occupation (farm labor, domestics, teachers, and governmental and *institutional workers*)	9,389,000
Total number of workers in eligible occupations	27,354,000"

Later, in conference, the conferees agreed that "hospitals not operated for profit" should be excluded. The issue, however, was, should they be excluded in terms or were they already covered? The conferees concluded that to refer to them in terms would be "surplusage", inasmuch as their charitable character—under identical language in other fiscal statutes[16]—had long been settled, and that to mention them specifically in the Social Security Act might unsettle this long-accepted construction. The conference report declares:[17]

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[15] Appellant is an "institution", (*Estate of Sutro*, 155 Cal. 727, 735). Webster's New Int. Dict.: "An established or organized society or corporation, an establishment, especially one of a public character or one affecting a community."

[16] This language goes back to, if not earlier than, the Revenue Act of 1916, (Paul & Mertens on Federal Income Taxation, Vol. 3, p. 575, Sec. 32.13).

[17] Cong. Rec., Vol. 79, Part 10, pp. 11,321 and 11,323, amendments Nos. 15 and 81, H. Rep. No. 1540, pp. 7, 12.

> "The Senate amendment adds to the list of purposes 'or hospital' as a clarifying amendment. The Senate recedes, the conferees omitting this language as surplusage, based on the fact that the internal revenue bureau has uniformly construed language in the income tax laws, identical with that found in the house bill, as exempting hospitals not operated for profit, and also on the fear that the insertion of the words added by the Senate amendment might interfere with the long-continued construction of the income tax law."

Language could not be clearer. The conferees intended that "hospitals not operated for profit" should *not* be taxed. To accomplish this, the Senate had proposed the addition of "or hospital", but only as a "clarifying" amendment.[18] Such "clarification", however, was deemed "surplusage". Moreover, there twice appears in each report (H. Rep. pp. 22, 33, Sen. Rep. pp. 33, 45), an explanation of "charitable", all four being virtually identical. Thus (H. Rep. p. 33):

> "Services performed in the employ of religious, charitable, scientific, literary, or educational institutions, no part of the net earnings of which inures to the benefit of any private shareholder or individual, are also exempt from the tax imposed by this title. For the purpose of determining whether such an organization is exempt, the *use to which the income is applied is the ultimate test of the exemption rather than the source from which the income is derived.* For instance, if a church owns an apartment building from which it derives income which is devoted to religious, charitable, educational, or scientific purposes, it will not be denied the exemption. The organizations which will be exempt from such taxes are churches, schools, colleges, and other educational institutions not operated for private

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[18] In the discussion in the House on the conference report, Mr. Hill, one of the conferees, stated that the greater part of the numerous amendments proposed by the Senate were "purely clarifying", (Rec. pp. 11, 774-5).

profit, the Y. M. C. A., the Y. W. C. A., the Y. M. H. A., the Salvation Army, and other organizations which are exempt from income tax under section 101 (6) of the Revenue Act of 1932." (Italics ours.)

The view of Congress accords with the great weight of authority. As said by Mr. Justice Cardozo in *Butterworth* v. *Keeler*, 219 N. Y. 446, 114 N. E. 803, non-profit "universities and hospitals are unquestionably public charities", or by Learned Hand, J., in *Slee* v. *Commissioner*, 42 Fed. (2d) 184, "to maintain health without profit—has been a recognized form of charity from time immemorial."

The intent and purpose of Congress are unmistakable. Even were it assumed that its view that non-profitable hospitals are charitable institutions is erroneous, its *intention* is none the less clear. That it was correct, is, however, overwhelmingly settled. Hence, we have ventured—no doubt unnecessarily—to set out in the appendix some of the authorities (pp. 26-28). They at least serve to show that Congress did not act arbitrarily.

We submit, therefore, that it was the "view, purpose and intent of Congress" that non-profit hospitals are charitable.

III.

It is established that the clause, "no part of the net earnings of which inures to the benefit of any private shareholder or individuals", refers to the destination of the income, and not to its source. Furthermore, Congress has construed this language as not applying to non-profit hospitals.

The meaning of the clause, "no part of the net earnings of which inures to the benefit of any shareholder or individuals", is well established. It refers to the end (the destination or use) to which the institution applies its net in-

come, and not to its source. In effect, it is the statutory equivalent of "non-profit".

It is clear, moreover, that, as regards "hospitals not operated for profit", Congress has placed its own construction thereon. Since it intended that they should *not* be taxed, it necessarily considered that this clause has no application to *such* hospitals.

If the *primary* purpose of the institution (the treatment of the sick without profit) is charitable, the receipt of rents or of other income, or payments by non-member patients, do not change this. Such activities are but mediate to the *primary* purpose. Moreover, the operation of a non-profit hospital, whose services are available to all, is itself a public purpose. Hence, when petitioner thus uses its surplus facilities to reduce its overhead, it is not departing from, but is furthering, its primary purpose. Accordingly, in the case of a charitable institution, neither net earnings, nor non-member receipts, inure to private advantage when used to promote its primary purpose.

The fact, then, that a non-profit institution—whose object is the promotion of health—uses net earnings from non-member patients (or rent from subletting of surplus facilities) to give to *more* people *better* service and at *lower* rates, does not cause it to lose the character of a "hospital not operated for profit". On the contrary, it thereby furthers that *general* benefit to the community which the exemption seeks to foster.

This, as to like language, was held in—

> *Trinidad* v. *Sagrada Orden de Predicadores*, 263 U. S. 578, 581, 68 L. Ed. 458, 44 S. Ct. 204:

Corporation sole, which received rents, interest and dividends, and profits from supplies furnished to its agencies, held, a charitable corporation, no part of whose net income so inured.

"Two matters apparent on the face of the clause go far towards settling its meaning. First, it recognizes that a corporation may be organized and operated exclusively for religious, charitable, scientific, or educational purposes, and yet have an income. Next, it says nothing about the source of the income, but makes the destination the ultimate test of exemption.

Evidently the exemption is made in recognition of the benefit which the public derives from corporate activities of the class named, and is intended to aid them when not conducted for private gain. Such activities cannot be carried on without money; and it is common knowledge that they are largely carried on with income received from properties dedicated to their pursuit."

At p. 582:

"In using the properties to produce the income, it therefore is adhering to and advancing those purposes, and not stepping aside from them or engaging in a business pursuit."

"Financial gain is not the end to which they are directed."

This is the principle laid down in the House and Senate Reports. The case has consistently been followed.[19]

Furthermore, under the rule of *noscitur a sociis*, "individuals", in the clause "any shareholder or individuals", means those having a direct proprietary or pecuniary interest, that is, *private* gain. Petitioner's members have no rights in its *property*, but only a right to treatment (10) Corp. Juris Secun. 297).

We submit, therefore, (a) that receipts from non-member patients at petitioner's hospital do not constitute "net

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[19] (Appendix, (pp. 28-30).)

earnings" inuring to the "benefit" of any member, and (b) that Congress clearly intended that the clause, "no part of the net earnings" &c, was not to apply to "hospitals not operated for profit."

IV.

"Exclusively" modifies "organized and existing", and not "charitable". The latter does not mean "wholly free".

In stating that "the hospital" must be "operated for no other purpose than that of dispensing charity"; (R. 53); that "the statute provides that the institution or corporation must be conducted 'exclusively' for charity" (R. 56), and that the statute provides that "the corporation fund or foundation must be operated 'exclusively' for charity" (R. 58), the opinion misconstrues the statute. By any such test, there would be few, if any, charitable hospitals. Virtually all, in varying degrees, accept paying patients.

"Exclusively", as the context shows, modifies "organized and operated", but does not qualify "charitable" nor affect its meaning. The language is not "exclusively charitable", but "organized and operated exclusively". "Exclusively" refers to the *purpose* for which the institution is "organized and operated." It does not preclude other activities in *aid* of that purpose. The statute excludes a corporation whose ends or purposes—not its means of support—are "noncharitable", but establishes no new criterion of "charitable". It does *not* mean "wholly free".

Since appellant's *purpose*—to treat the sick without profit—is a charitable one, and since any net earnings are devoted exclusively to that purpose, it is operated "exclusively" for charitable purposes.

The rendering of medical assistance without profit to an indefinite portion of the public (petitioner's unlimited membership), and the hospital service available to and actually used by the rest of the public, constitute in every sense a "charitable" purpose.

Ould v. *Washington Hospital*, 95 U. S. 303 (a leading case):

> "A charitable use, where neither law nor public policy forbids, may be applied to almost anything that tends to promote the well being of social man." (Perry Tr., sec. 687)

Here, again, the intention of Congress is clear. The exclusion is of "hospitals not operated for profit", that is, of *all* such hospitals. Such exclusion is not limited to "free", or to "non-member", hospitals.

But were the intention of Congress doubtful, it would then be presumed to have acted in the light of the settled principles—briefly referred to in the appendix (pp. 30-32)—by which an institution's charitable character is determined. Some of them are here peculiarly applicable, such as, (a) that the test of a charity is to be found in the purpose for which the institution is founded and exists, and that the motives of or benefit to a donor or settlor are immaterial, and (b) that restriction of benefits to members does not affect its charitable character. The latter rule very recently was reaffirmed in *Estate of Henderson* (1941) 17 Cal. (2d) 853.

We submit, therefore, that the District Court of Appeal erred, both in its construction of the statute and in holding that a hospital is charitable only when its services are rendered wholly free.

Petitioner respectfully urges that a writ of certiorari be issued.

Respectfully submitted,

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APPENDIX A.

THE JOURNAL of the American Medical Association, issue of March 27, 1943, Vol. 121, No. 13, p. 1011:

"NONGOVERNMENTAL HOSPITALS.

In the field of nongovernmental institutions there are 4,421 hospitals—a reduction in number from 4,494 nongovernmental hospitals existing a year ago. Their bed capacity at present, however, is 368,046, a considerable increase over 358,870 reported last year. Their basinets now number 59,620 as compared with 54,669 a year ago. The total patients admitted were 8,535,935, showing quite a large increase over their former figure, 7,933,586. The average census changed during the year from 255,147 to 267,390.

The nongovernmental hospitals fall readily into two general groups—the nonprofit organizations, section B of table 1, composed of those that are church related, and other nonprofit associations; and section C of table 1, composed of hospitals that are owned by individuals or partnerships and those owned by corporations that are unrestricted as to profit. In the nonprofit group are 2,926 with a capacity of 316,291 and 51,416 basinets to which were admitted 7,463,648 patients and which had an average census of 236,154. The nonprofit group, therefore, showed a strong increase, and the growth was shared in some part by the church related hospitals but to a much greater extent by the other nonprofit associations.

Church hospitals show a net loss from 993 to 977 but a considerable increase in the number of beds and basinets. Their patients admitted increased from 2,961,594 to 3,211,162 and their average census from 90,195 to 94,521.

The other nonprofit associations increased in number from 1,917 to 1,949 and in capacity from 182,140 beds to 190,150 beds and in bassinets from 26,422 to 29,154. They admitted 4,252,486 as compared with 3,931,141 last year, and their average census was 141,633 as compared with 132,472 last year."

APPENDIX B.

Section 2 of
California Unemployment Insurance Act (Statutes 1935), p. 1227.

This act is enacted as a part of a National plan of unemployment reserves and social security, and for the purpose of assisting in the stabilization of unemployment conditions. The imposition of the tax herein imposed upon California industry alone, without a corresponding tax be imposed upon all industry in the United States, would, by the corresponding penalty upon California industry, defeat the very purposes of this act set forth in section 1. Therefore this act shall take effect only if and when there is enacted legislation by the United States Government providing for a tax upon the payment of wages by employers in this State, against which all or any part of the contributions required by this act may be credited.

Whenever such legislation enacted by the United States Government is repealed, amended, affected or otherwise changed in such manner that the contributions required by this act or some portion thereof can not be thus credited, then upon the date of such change, the provisions of this act requiring contributions and providing for payment of benefits shall cease to be operative and any assets in the unemployment fund or unemployment administration fund shall in the discretion of the State Treasurer be held in the then existing depositaries or otherwise in the State treasury. In the case of the unemployment administration fund, such moneys may thereafter be dealt with by the State Treasurer pursuant to the conditions of the grant thereof to the State by the United States Government or agency thereof.

APPENDIX C.

Authorities Holding Non-Profit Hospitals To Be per se Charitable Institutions.

Buchanan *v.* Kennard, 234 Mo. 117, 139, 136 S. W. 415, Ann. Cas. 1912D 50.

In re Mendelsohn, 262 App. Div. 605, 31 N. Y. S. (2d) 435, 440, (social security tax).

Commissioner of Internal Revenue *v.* Battlecreek Inc., 126 Fed. (2d) 405, (income tax).

In re Rust's Estate, 168 Wash. 344, 12 Pac. (2d) 396, 398 (1932), (Exemption from taxation).

New England Sanitarium *v.* Inhabitants of Stoneham, 205 Mass. 335, 91 N. E. 385, 387, (1910), (Exemption from taxation).

Mulliner *v.* Evangelischer Diakonniessenverein, 144 Minn. 392, 175 N. W. 699.

Magnuson *v.* Swedish Hospital, 99 Wash. 399, 169 Pac. 828, 830, (1918).

Brattleboro Retreat *v.* Town of Brattleboro, 106 Vt. 228, 173 A. 209, 212, (1934), (Exemption from taxation).

Hearns *v.* Waterbury Hospital, 66 Conn. 98, (1895), 33 Atl, 595.

Lutheran Hospital Ass'n. *v.* Baker, 40 S. D. 226, 167 N. W. 148 (1918), (Exemption from taxation).

State *v.* H. Longstreet Taylor Foundation, 198 Minn. 263, 269 N. W. 469 (1936), (Exemption from taxation).

German Hospital *v.* Board of Review, 233 Ill. 246, 84 N. E. 215. (Exemption from taxation).

Barnes *v.* Providence Sanitarium, 229 S. W. 588, (Tex. Civ. App.).

County of Henepin *v.* Brotherhood of Gethsemane, 27 Minn. 460, 38 A. R. 298, (Exemption from taxation).

Maretick *v.* South Chicago Community Hospital, 297 Ill. App. 488, 17 N. E. (2d) 1012, 1013.

Union Pacific Railway Co. *v.* Artist, 60 Fed. 365, (C. C. A. 8th, 1894), (Railroad hospital).

Texas Central R. Co. *v.* Zumwalt, 103 Texas 603, 132 S. W. 113, 30 L. R. A. (N. S.) 1206, (Railroad hospital).

Carr *v.* Northern Pacific Beneficial Ass'n., 128 Wash. 484, 221 Pac. 981.

Richardson *v.* Carbon Hill Coal Co., 10 Wash. 656, 39 Pac. 95.

Wells *v.* Ferry Baker Lumber Co., 57 Wash. 658, 107 Pac. 869, 29 L. R. A. (N. S.) 426.

Barden *v.* Atlantic Coastline Ry. Co., 152 N. C. 318, 67 S. E. 971.

Thomas *v.* Postal Telegraph-Cable Co., 48 S. W. (2d) 422, (Ct. Civ. App. Tex. 1930).

Galveston H. & S. A. Ry. Co. *v.* Hanway, 57 S. W. 695, (Ct. Civ. App. Tex. 1900).

Southern etc. Sanitarium *v.* Wilson, 45 Ariz. 522, 46 Pac. (2d) 118, 125, 77 Pac. (2d) 458.

Bedford *v.* Colorado Fuel & Iron Corp. 102 Colo. 538, 81 Pac. (2d) 752, 759.

Miller *v.* Mohr, 198 Wash. 619, 89 Pac. (2d) 807.

McDonald *v.* Mass. Gen'l Hospital, 120 Mass. 432, 21 Am. Rep. 529.

Reynolds Memorial Hospital *v.* Marshall County Court, 78 West Va. 685, 90 S. E. 238 (1916).

Enell *v.* Baptist Hospital, 45 S. W. (2d) 395 (Tex. Civ. App. 1931).

City of Palestine *v.* Missouri-Pacific Lines H. Ass'n., 99 S. W. (2d) 311, (Ct. Civ. App. Tex. 1936).

Miami Battlecreek *v.* Lummus, 140 Fla. 718, 192 So. 211 (1939).

Rush Hospital Benev. Ass'n. *v.* Board of Sup'rs., 187 Miss. 204, 192 So. 829 (1940).

Piedmont Memorial Hospital *v.* Guilford County, 218 N. C. 673, 12 S. E. (2d) 265.

Virginia Mason Hospital *v.* Larson, 9 Wash. (2d) 284, 114 Pac. (2d) 976, (social security tax).

Beverly Hospital *v.* Early, 292 Mass. 201, 197 N. E. 641, 100 A. L. R. 1332.

City of Dallas *v.* Smith, 130 Tex. 225, 107 S. W. (2d) 872.

Illinois Central R. Co. *v.* Moodie, 23 Fed. (2d) 902 (C. C. A. 5th).

Scott on Trusts (1939), p. 1996.

Zollman on Charities, p. 188.

Trusts, Restatements, Sections 372, 376.

Bogert on Trusts (1935), Vol. 2 p. 1163.

APPENDIX D.

Authorities relative to clause, "No part of the net earnings of which applies to the benefit of any private shareholder or individual."

United States v. *Proprietors of Social Law Library,* 102 Fed. (2d) 481, 484, (C. C. A. 1st, 1939).

Application of net earnings to improvements to Library rendering it more serviceable to members, does not make institution non-charitable.

Santee Club v. *White,* 87 Fed. (2d) 5, (C. C. A. 5th).

Profit on sale of small unusable portion of lands of game club does not inure to its shareholders, use of club's facilities not being a "benefit".

Koon Kreek Klub v. *Thomas,* 108 Fed. (2d) 616, 618 (C. C. A. 5th).

Rents from grazing privilege in club's game preserve, and cash consideration paid for oil lease thereon, same being used to pay mortgage on club's property, held not to "inure" to members' benefit.

Scofield v. *Corpus Christi Golf & Country Club.* 127 Fed. (2d) 452, (C. C. A. 5th, 1942).

Factual situation similar to that in preceding case.

Commissioner of Internal Revenue v. *Kensico Cemetery,* 96 Fed. .(2d) 594, 596 (C. C. A. 2d, 1938).

"Intangible values" resulting from application of revenues of membership cemetery corporation to extension of cemetery and to embellishment of grounds, does not inure as a net profit to members.

District of Columbia v. *Mt. Vernon Seminary,* 100 Fed. (2d) 116, 118 (Ct. App. Dist. Col.)

Property is not used for "private gain" and is exempt from taxation, where all net earnings used for educational purposes and continued improvement of institution.

Crooks v. *Kansas City Hay Dealers' Ass'n.,* 37 Fed. (2d) 83, 87.

That, on final dissolution, accumulated profits would go to the individual members, does not destroy exemption.

Roche's Beach Inc. v. *Commissioner,* 96 Fed. (2d) 776, C. C. A. 2d (1938).

Profit-making corporation required, under testamentary trust, to turn over income to a charitable foundation, held exempt from income tax as a corporation organized and operating exclusively for charitable purposes.

King County Insurance Association, 37 B. T. A. 288, 292 (1938).

Receipt of income by non-profit organization, which served to reduce members' dues, does not inure to benefit of private individual.

Oregon Casualty Association, 37 B. T. A. 340, 345 (1938).

Return to members of non-profit organization of overpayment of assessments does not constitute an inuring to their benefit.

Waynesboro Manufacturers Ass'n., 1 B. T. A. 911, 914.

Earnings of non-profit association, where retained by it for its own use, do not constitute an inuring to benefit of any individual.

Accord.

American Society of Cinematographers, 42 B. T. A. No. 102.

There have been similar rulings by the Treasury Department.

Cum. Bull. III-1, p. 230, 232, S. M. 2710.

Cum. Bull. 1919, p. 202, S. 958.

APPENDIX E.

The principles by which an institution's charitable character is determined.

(a) *The nature of "charity" in General.* "Charity" represents "both a personal and a social endeavor to ameliorate the conditions which exist in society", (Enc. Brit., 14th (1936) Ed., Vol. 5, p. 248). "It has no necessary relation to relief or alms. It may mean a consideration shown for the welfare of others either individually or generally" (Id.) A charitable use refers to "almost anything that tends to promote the well doing and well being of social man." * In 3 Paul & Mertens on Federal Income Taxation, p. 582, Sec. 32.19, "charity" is defined as "a gift, act or service for the benefit of an indefinite number of persons."

(b) "Charity" is not limited to almsgiving or gifts to the poor, but its legal meaning is more comprehensive than its popular significance.

Bogert on Trusts, Vol. 2, pp. 1163-4;

Gossett *v.* Swinney, 53 Fed. (2d) 772, 776;

Old Colony Trust Co. *v.* Welch, 25 Fed. Supp. 45, 58 (D. C. D. Mass. 1938);

Harrison *v.* Barker Annuity Fund, 98 Fed. (2d) 286 (C. C. A. 7th);

Darcey *v.* O'Brien, 65 Fed. (2d) 599 (Ct. App. Dist. Col.);

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* Ould *v.* Washington Hospital, 95 U. S. 303, 311.

Powers *v.* Massachusetts Homeopathic Hospital, 101 Fed. 896 (Cir. Ct. Mass.);
14 Corp. Jur. Secun. 411.

(c) The test of a charity is to be found in the purpose for which the institution is founded and exists. The motive of, or benefit to, a donor or settlor are immaterial.

Bogert on Trusts, Vol. 2, pp. 1126-7;
Fire Insurance Patrol *v.* Boyd, 120 Pa. St. 624, 6 A. S. R. 745, 750, 1 L. R. A. 417;
Fordyce & McKee *v.* Women's Christian Nat. Library Ass'n., 79 Ark. 550, 96 S. W. 155;
Harrison *v.* Barker Annuity Fund, 98 Fed. (2d) 286;
Union Pacific Railway Co. *v.* Artist, 60 Fed. 365 (C. C. A. 8th, 1894);
Parsons *v.* Childs, 345 Mo. 689, 136 S. W. (2d) 327, 332; Cert. den. 310 U. S. 640;
Old Colony Trust Co. *v.* O. M. Fisher Home, Inc., 301 Mass. 1, 16 N. E. (2d) 10. (1938);
Westport Bank & Trust Co. *v.* Fable, 126 Conn. 665, 13 Atl. (2d) 862, 866 (1940).

(Whatever the motives of those who are now, or in the past have been, appellant's members, there now exists, largely from donations and bequests, an institution which, without profit, and at a charge to them of less than half its actual outlay, affords complete protection to the health of nearly ten thousand persons, and also stands ready to treat, on like terms, all other persons complying with its simple and non-exclusive requirements for admission.)

(d) That a non-profit institution makes a charge against members, or that its inmates pay a consideration on their admission, or that a non-profit school or hospital makes some charge to help to defray the cost of its operation, does not affect its charitable character.

Bogert on Trusts, pp. 114-115;
Estate of Lowe, 326 Pa. 375, 192 Atl. 405, 111 A. L. R. 518 (1937);

People *v.* Morton, 373 Ill. 72; 25 N. E. (2d) 504 (1940);
Little *v.* City of Newburyport, 210 Mass. 414, 96 N. E. 1032;
In re McDowell, 217 N. Y. 454, 112 N. E. 177;
In re Y. M. C. A. Retirement Fund Inc., 18 B. T. A. 139;
Episcopal Academy *v.* Phila., 150 Pa. 565, 573;
Summers *v.* Chicago Title & Trust Co., 335 Ill. 564, 167 N. E. 777.
Andrews *v.* Young Men's Christian Association, 226 Iowa 374, 284 N. W. 186 (Iowa 1939).

(e) Restriction of benefits to its own members does not affect a non-profit institution's charitable character.

(It would be misleading to argue that petitioner "restricts" its benefits to "its own" members. Since membership is unlimited, it evidently seeks to diffuse them as widely as possible.)

Bogert on Trusts, Vol. 2, pp. 1124-25;
Hibernian Benevolent Society *v.* Kelly, 28 Ore. 173, 42 Pac. 3, 30 L. R. A. 167, 52 A. S. R. 769;
Morrow *v.* Smith, 145 Ia. 514, 124 N. W. 319;
United States *v.* Proprietors of Social Law Library, 102 Fed. (2d) 481, 484 (C. C. A. 1st, 1939);
Pease *v.* Pattinson, L. R. 32 Ch. Div. 154, 55 L. J. Ch. N. S. 617, 54 L. T. N. S. 209;
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Carter *v.* Whitcomb, 74 N. H. 482, 487, 69 Atl. 779;
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 1063 80

LA SOCIETE FRANCAISE DE BIENFAISANCE MUTUELLE (a corporation),

Petitioner,

vs.

CALIFORNIA EMPLOYMENT COMMISSION (formerly known as Unemployment Reserves Commission),

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT, DIVISION ONE

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25342 *printed in* CALIFORNIA STATE PRINTING OFFICE
SACRAMENTO, 1943 GEORGE H. MOORE, STATE PRINTER

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In the Supreme Court

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LA SOCIETE FRANCAISE DE BIENFAISANCE MUTUELLE (a corporation),

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CALIFORNIA EMPLOYMENT COMMISSION (formerly known as Unemployment Reserves Commission),

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORINIA FOR THE FIRST APPELLATE DISTRICT, DIVISION ONE

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

I

OPINION OF THE STATE COURT

The opinion of the District Court of Appeal is reported in 56 A.C.A. 593, and 133 Pac. (2d) 47,

and appears in the record. (R. 48-67.) On March 8, 1943, the Supreme Court denied without opinion petitioner's application for a hearing. (R. 68.)

II

JURISDICTION

The judgment of the District Court of Appeal sought to be reviewed was entered January 8, 1943. (R. 67.) It became final February 7, 1943. (Cal. Const. Art. VI, Sec. 4(c).) The time within which the State Supreme Court could hear and determine said matter expired March 9, 1943. The petition was filed on June 3, 1943. Jurisdiction was invoked under Sec. 237(b) of the Judicial Code.

III

STATEMENT OF THE STATUTES INVOLVED

The pertinent portions of the California Unemployment Insurance Act (Chapter 352, Stats. of 1935, as amended) are set forth in the Appendix hereto.

IV

STATEMENT OF THE CASE

The statement of facts presented by the petitioner is substantially correct. However, these additional points should be noted. Sections 37, 38, and 44[1] of the California Unemployment Insurance Act (Stats. of 1935, Chapter 352, as amended), impose compulsory contributions on "employers" and their work-

[1] These sections are set forth in the Appendix to this brief.

ers based upon wages paid and received for "employment." Section 6.5 defines "employment" generally as services performed for wages or under any contract of hire.[1] Section 7 specifically excludes from the term "employment" certain types of service. The exclusion involved in this act is found in Section 7(g) which reads as follows:

> "Sec. 7. The term 'employment' does not include:
>
> * * * * *
>
> (g) Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual;"

The petitioner claiming to come within the provisions of said Section 7(g) paid under protest various sums of contributions aggregating $36,045.84, to the respondent, a state-wide administrative agency created by and exercising the powers conferred upon it by the California Unemployment Insurance Act.

Section 7(g) is, with a minor exception not material here, virtually identical in content with Sections 811(b)(8) and 907(c)(7) of the Federal Social Security Act (now Sections 1426(b)(8) and 1607(c)(7) of the Internal Revenue Code). The California Unemployment Insurance Act was ap-

[1] These sections are set forth in the Appendix to this brief.

proved by the Governor on June 25, 1935, and the Federal Social Security Act was approved August 14, 1935.

In 1939 the Commissioner of Internal Revenue advised petitioner that its former exemption from income tax under Section 101(6) of the Revenue Act of 1936 was revoked, but that it was entitled to exemption under Section 101(8) of the Revenue Act of 1938 relating to civic leagues and local associations of employees. (R. 32, 33.) In a letter dated April 3, 1939, the Commissioner of Internal Revenue revoked the exemption from social security taxes previously accorded petitioner by former letters of the Commissioner. (R. 34, 35.)

V
ARGUMENT

SUMMARY OF ARGUMENT

Point A. Jurisdiction of this matter does not exist under Section 237(b) of the Judicial Code since the decision of the State court did not involve the construction of a Federal statute.

Point B. The District Court of Appeal of the State of California did not err in holding that a nonprofit hospital was not charitable per se within the meaning of Section 7(g) of the Unemployment Insurance Act.

Point A. Jurisdiction of This Matter Does Not Exist Under Section 237(b) of the Judicial Code Since the Decision of the State Court Did Not Involve the Construction of a Federal Statute

A review by writ of certiorari is not a matter of right but of sound judicial discretion and will be

granted only where there are special and important reasons therefor. In this matter the State court did not decide a Federal question of substance, but decided that under Section 7(g) of the California Unemployment Insurance Act the petitioner herein was not organized and operated exclusively for charitable, scientific and educational purposes, no part of the net earnings of which inured to the benefit of any private member or individual.

The necessary prerequisite for a review by certiorari is exemplification of a Federal question that was affirmatively presented, that its decision was necessary to the determination of the cause, that it was actually decided or that the judgment as rendered could not have been so without deciding it.

Adams v. *Russell,* 229 U. S. 353, 33 S. Ct. 846, 57 L. Ed. 1224;

Southwestern Bell Telephone Co. v. *Oklahoma,* 303 U. S. 206, 212, 82 L. Ed. 751;

Palmer v. *State of Ohio,* 248 U. S. 32, 39 S. Ct. 16, 63 L. Ed. 108;

Chicago R. I. & P. R. Co. v. *Maucher,* 248 U. S. 359, 39 S. Ct. 108, 63 L. Ed. 294;

Whitney v. *California,* 274 U. S. 357, 47 S. Ct. 641, 71 L. Ed. 1095.

In this action, it is apparent that a decision made by the District Court of Appeal of the State of California as to the petitioner's liability under the California Unemployment Insurance Act could and would have no effect upon petitioner's status under the Federal Social Security Act. Therefore, no

construction of the Federal statute could be involved nor did the District Court evade its determination. As stated in *Vandalia Railroad Company* v. *Indiana, ex rel. The City of South Bend,* 207 U. S. 359, 52 L. Ed. 246:

> "Doubtless this court is not concluded by the ruling of the state court, and must determine for itself whether there is really involved any Federal question which will entitle it to review the judgment. *Newport Light Company* v. *Newport,* 151 U. S. 527, 536, and cases cited in the opinion. A case may arise in which it is apparent that a Federal question is sought to be avoided or is avoided by giving an unreasonable construction to pleadings, but that is not this case. Even if it be conceded that the conclusion of the Supreme Court of the State is not free from doubt, there is nothing to justify a suspicion that there was any intent to avoid the Federal questions. The construction placed by that court upon the pleading was a reasonable one."

The question of whether or not the petitioner was entitled to exemption under Section 7(g) of the Unemployment Insurance Act, respondent submits is a local question. A decision upon this ground by the State court supports the judgment and leaves no Federal question open for the determination of the Supreme Court, thus the writ of certiorari should not issue.

> *Murdock* v. *Memphis,* 20 Wall. 590, 634-636, 22 L. Ed. 429, 443, 444;

Live Oak Water Users' Assoc. v. *Railroad Commission,* 269 U. S. 354, 359, 70 L. Ed. 305;

Richardson Mach. Co. v. *Scott,* 276 U. S. 128, 72 L. Ed. 497.

This court has recognized that the Federal Social Security Act does not inhibit the power of the State to legislate freely and to administer its own acts.

Steward Machine Co. v. *Davis,* 301 U. S. 548, 57 S. Ct. 883, 81 L. Ed. 1279;

Standard Dredging Corp. v. *Murphy,* 63 Sup. Ct. 1067, 87 L. Ed. 1017.

The fact that unemployment relief was sought to be alleviated upon a nationwide basis under a Federal-State plan of unemployment insurance does not destroy the separate and distinct character of State legislation in this field.

Shore Fisheries Inc. v. *Board of Review* (N. J. 1941), 21 Atl. 2d 634;

Buckstaff Bath House v. *McKinley* (1939), 308 U. S. 358, 84 L. Ed. 322.

It is well settled that the State may determine what shall constitute employment subject to taxation without regard to existing definitions or categories and is not required to conform in every respect to the national thought upon the subject as expressed in the acts of Congress.

Unemployment Comp. Comm. v. *National Life Insurance Co.,* 219 N. C. 576, 14 S.E. 2d 689;

Brannaman v. *Richlow Manufacturing Co.,* 106 Colo. 317, 104 Pac. 2d 897;

Equitable Life Ins. Co. v. *Iowa Unem. Security Comm.*, 2 N. W. 2d 262, 265;
Standard Dredging Corp. v. *Murphy*, 63 Sup. Ct. 1067, 87 L. Ed. 1017.

Thus, the judgment here in question had to do exclusively with the interpretation of the State statute and insofar as the Federal Social Security Act was concerned, its interpretation was not challenged but on the contrary the result reached by the California courts was in accord with the results reached by the Federal courts on cases involving similar facts.

Smith v. *Reynolds*, 43 Fed. Supp. 510;
Hassett v. *Associated Hospital Service Corp. of Mass.*, 125 Fed. 2d 611.

Point B. The District Court of Appeal of the State of California Did Not Err in Holding That a Non-Profit Hospital Was Not Charitable Per Se Within the Meaning of Section 7(g) of the Unemployment Insurance Act

Under the California Unemployment Insurance Act as interpreted by the California courts a person claiming exemption from the taxing provisions under Section 7(g) thereof must meet the statutory requirements for exemption which are three in number (1) That it was organized exclusively for charitable purposes; (2) That it was and is operated exclusively for charitable purposes; (3) That no

part of its net earnings inures to the benefit of any private shareholder or individual.

California Employment Commission v. *Bethesda Foundation*, 54 Cal. App. 2d 348, 128 Pac. 2d 874.

The fact that a hospital corporation was organized under a statute relating to benevolent, charitable or educational corporations is not of itself governing.

California Employment Commission v. *Bethesda Foundation*, 54 Cal. App. 2d 348, 128 Pac. 2d 874;
In re Dol's Estate, 182 Cal. 159, 187 Pac. 428;
Brown v. *La Societe Francaise*, 138 Cal. 475, 71 Pac. 516.

To the same effect see

Fleming Hospital, Inc. v. *Williams* (Texas), 169 S.W. 2d 241.

That petitioner herein is not a charitable corporation within the meaning of Section 7(g) of the California Act is supported by a long line of authorities.

Brown v. *La Societe Francaise*, 138 Cal. 475, 71 Pac. 516;
In re Dol's Estate, 182 Cal. 159, 187 Pac. 428;
Smith v. *Reynolds*, 43 Fed. Supp. 510;
Hassett v. *Associated Hospital Service Corp. of Mass.*, 125 Fed. 2d 611;
Mohawk Mills Assn. v. *Miller*, 22 N.Y.S. 2d 993;
St. Louis-Southwestern R. Co. v. *Yates*, 23 Fed. 2d 283;

Re Philadelphia & Reading Relief Ass'n., 4 B.T.A. 713;

Coe v. *Washington Mills*, 149 Mass. 543, 21 N.E. 966;

Board of County Commissioners v. *Denver & R. G. R. Co. Employees' Relief Association*, 70 Colo. 592, 203 Pac. 850;

Young Men's Protestant Temperance & Beneficial Society v. *City of Fall River*, 160 Mass. 409, 36 N.E. 57;

Franta v. *Bohemian Roman Catholic Central Union*, 164 Mo. 304, 63 S.W. 1100;

State Council C. K. v. *Board of Review*, 198 Ill. 441, 64 N. E. 1104;

In re Prange's Will, 208 Wisc. 404, 243 N. W. 488;

In re Kennedy's Estate, 269 N. Y. S. 136;

19 R. C. L. 1182, Sec. 5;

14 Corp. Jur. Sec. 420;

Zollman, American Law of Charities, 143, 144;

Mutual Aid and Benefit Ass'n., etc. v. *Commissioner*, 17 B.T.A. 967;

Employees Benefit Ass'n., etc. v. *Commissioner*, 14 B.T.A. 1166;

Pontiac Employees Mutual Benefit Ass'n. v. *Commissioner*, 15 B.T.A. 74.

CONCLUSION

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in

this court, and that the petition for a writ of certiorari should be denied.

DATED: This 9th day of July, 1943.

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APPENDIX

The applicable portions of the California Unemployment Insurance Act (Chap. 352, Stats. of 1935, as amended) are as follows:

Sec. 6.5. "Employment," subject to the other provisions of this act, means service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied.

* * * * *

Sec. 7. The term "employment" does not include:

* * * * *

(g) Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual;

Sec. 37. (a) On and after January 1, 1936, contributions to the unemployment fund shall accrue and become payable by every employer for each calendar year in which he is subject to this act, with respect to wages paid for employment occurring during the calendar year 1936 and upon wages payable during subsequent calendar years; provided, however, that if and when the taxes payable under Title IX of the Federal Social Security Act (or the corresponding provisions of the Internal Revenue Code, or any other Federal act into which such tax now is or hereafter may be incorporated) become pay-

able on a basis of "wages paid" rather than "wages payable," then as of that time the contributions due hereunder shall thereafter be upon wages paid. Such contributions shall become due and be paid to the commission for the unemployment fund by each employer in accordance with such regulations as the commission may prescribe, and shall not be deducted in whole or in part, from the wages of individuals in his employ.

(b) In the payment of any contributions, a fractional part of a cent shall be disregarded unless it amounts to one-half cent or more, in which case it shall be increased to one cent.

Sec. 38. Every such employer shall pay into the unemployment fund contributions equal to the following amounts:

(a) During the year 1936, with respect to payments of wages made during that year, ninety one-hundredths per cent of all wages paid by him in employment subject to this act;

(b) For the year 1937, one and eighty-one hundredths per cent of all wages payable by him during such year with respect to employment subject to this act;

(c) For the year 1938 and thereafter, two and seventy one-hundredths per cent of all wages with respect to which contributions become due and payable for employment subject to this act.

* * * * *

Sec. 44. Beginning on January 1, 1936, each worker, employed by an employer subject to this act, shall contribute to the fund one-half of one per cent of his wages paid by an employer with

respect to employment; and beginning on January 1, 1937, nine-tenths of one per cent of such wages and on and after January 1, 1938, and after his employer has satisfied the conditions set forth in this act with respect to becoming an employer, one per cent of such wages; except that the rate of contributions required of a worker shall not in any year exceed 50 per cent of the general rate required of employers. Each employer shall, notwithstanding any provisions of law in this State to the contrary, withhold in trust the amount of his workers' contributions from their wages at the time such wages are paid, shall show such deduction on his pay roll records, shall furnish each worker with a statement in writing showing the amount which has been deducted, in such form and at such times as the commission may prescribe, and shall transmit all such contributions to the fund, in addition to his own contributions, pursuant to regulations of the commission.

Contributions by workers, payable to the commission as herein provided, shall be exempt from garnishment, attachment, execution or any other remedy for the collection of debts.

Each employer shall be liable for any and all contributions required to be made by his workers on account of wages paid to them by such employer regardless of whether or not such employer shall have made a deduction on account thereof from the workers' wages at the time such wages were paid; provided, however, that no employer shall be liable for contributions required on behalf of himself or of any of his

employees with respect to wages payable or paid, as the case may require, while there is in effect at the time such wages became payable or were paid (whichever time is the time for determining contribution liability) a rule or regulation or interpretation of the commission or of the department that such wages were not subject to contributions imposed by this section. As used in this act, except when the context clearly requires otherwise, the term "contributions" shall include the contributions of workers pursuant to this section.

The commission or the department may prescribe the extent, if any, to which any rule, regulation of interpretation issued or promulgated in accordance with the provisions of this act shall be applied without retroactive effect.

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